



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE
AMERICAN LAW REGISTER
AND
REVIEW

APRIL, 1892.

SHYLOCK *v.* ANTONIO—JUDGMENT AFFIRMED.

BY GEORGE WHARTON PEPPER, ESQ.

In a recent number of the *American Law Review*¹ Professor James M. Love has published "A Lawyer's Commentary upon Shylock *v.* Antonio." It seems that the commentary was originally delivered by the author to his students, in Iowa University, at the conclusion of a course of lectures on the law of contracts. The report of the litigation is given, for the most part, in the very words of the Great Reporter, and then the author feels compelled to declare that the trial, from a legal point of view, is "from end to end a tissue of absurdities." "The idea," says Professor Love, "of the 'grave and reverend seigniors' of Venice, rulers who are world-renowned for their unequalled astuteness and knowledge of affairs, listening with complacency to the exposition of the laws of their own city by a beardless boy of sixteen or seventeen summers, is such a violation of probability as to give the whole scene a melodramatic air." And again: "Were the duke and all of

¹ 25 Am. Law Review, 899.

his wise judges and counsellors ignorant of the laws of Venice? Had no one of them the faintest conception of the principles of universal justice? If they had any knowledge whatever of jurisprudence, what must they have thought of the law as laid down by the saucy little doctor, to the effect that Antonio had no right to discharge the bond by tendering the amount due in open court, but that his life must needs be forfeited because he had failed to pay off the obligation on the very day of its maturity."

Now the first of these extracts, it will be noticed, involves the assumption that Portia's statement of the law was, as Professor Love subsequently styles it, "a piece of sublime pettifogging." If it shall appear that her opinion was, on the contrary, a lucid exposition of sound legal principles in their application to the case in hand, it will follow that honor, and not ridicule, should be the meed of that learned Court which refused to give place in its criminal law to "the heinous crime of being a young man."

As to the second extract, I content myself with remarking that it was a well-known principle of the common law of England, until the *strictum jus* was modified by equitable principles,¹ that a tender after the maturity of the bond was too late, even if made in court, and that the obligee had a right to insist upon the penalty.² If I am then referred to Professor Love's statement that "it was simply monstrous to maintain that a contract, the very purpose of which was murder, could have the least shadow of validity," I retort by quoting from the distinguished German jurist, Pietscher.³ "I believe that I dare assert," says he, in commenting upon a similar criticism made by Dr. Ihering, "that at that time in Venice the consideration that 'a contract against morals was void' was not yet recognized or regarded as a valid plea. For this consideration,

¹ "It may be observed here that the law language of Shakespeare is that of the common law, and not of equity jurisprudence."—C. K. Davis, *Law in Shakespeare*, p. 117.

² Indeed, courts of common law had no power to refuse to enforce penalties until such power was given by statute. See Bispham on Equity (4th ed.), § 178.

³ Landgerichts-Präsident; *Jurist und Dichter*, Dessau 1881, p. 19.

or more properly its recognition in law, belongs only to the higher grades of culture, and always even then depends on the prevailing estimate of what is immoral, and its *full* significance will have to remain, I suppose, a pious wish."

With these preliminary remarks, I proceed to examine Portia's conception of the case and the "opinion of the Court" as delivered by her. For, after all, it is to the opinion that a lawyer must look if he wishes really to fathom the case. And, in order to understand the opinion he must first ascertain what the Court actually decided and then interpret the language of the judge in the light of the decision. It is manifestly unfair to criticise the Venetian Court, as the scoffers do, for being puzzled in advance of an orderly examination of the question. Doubtless we could find a similar state of affairs in the consultation-room of many a modern court, even after the judges have heard a careful and elaborate argument upon the point of law involved. Similarly it may be said to be unfair to criticise Portia's opinion in *fragments*. It must be taken as a whole, and its parts must be interpreted with reference to one another. Such a method is required by common justice; a criticism which ignores this method and then accuses Portia of "quibbling," brings itself within the operation of the good old maxim, "Those who live in glass houses should not throw stones."

And it is here that I take issue with Professor Love. I admit that his view is sustained by respectable authority. Haynes, Davis, Campbell, Judge Cowen, Ihering—all declare that Antonio was saved by a quibble.¹ It is, indeed, astonishing to see the amount of learning and research which has been expended upon the law involved in the trial scene. On delving for the first time into the work of some of the German scholars, I feel like one who has by chance turned up a mossy stone and is amazed to see the industry displayed by a colony of ants who live and work beneath it. But all these learned critics discard what I have indicated as the only rational method of treating the

¹ See notes to trial scene and appendix to "The Merchant of Venice," in Furness's Variorum Shakespeare.

question. They all regard Portia's statements, not as part of a connected and logically developed judicial utterance, but as separate and distinct propositions which they proceed to construe as if each stood alone and had no reference to the others. They are misled by the dramatic form in which the opinion is reported. Merely because it was impossible, from the play-wright's point of view, that the trial scene should be a monologue by Portia, these critics compel her to suffer the consequences of that which was done for their own delectation and for that of the rest of the audience.

We may now examine Professor Love's objections to the opinion which Portia delivered in the capacity of *amicus curiæ*. His view may be thus expressed: The learned [formal, merely] Portia erred (1) because, assuming the bond to be otherwise valid, she did not declare it void as having been obtained by fraud; (2) because she declared that the bond was valid; (3) because she, in the next breath, declared that in procuring it Shylock had committed a heinous crime; (4) because she declared that the bond, although valid, conferred no right to shed as much blood as was reasonably necessary in removing the flesh.

But what, in fact, did the Court decide? *The decision was, that the bond was a contract to do something forbidden by statute, that it was consequently void, and that there could be no recovery upon it. Also that such a contract came within the terms of another statute, which made it penal for an alien, by direct or indirect attempts, to seek the life of any citizen.* There is surely no error in this; a modern court, under the same circumstances, would make a similar decree and order the bond to be cancelled.

But what of Professor Love's specifications of error? I proceed forthwith to examine them.

As to the first, it seems that Professor Love bases his claim of fraud upon Shylock's representation that the bond was to be sealed "in merrie sport," and upon the fact that the Jew treated the whole matter as a joke, by asking—

Praise you tell me this,
If he should breake his daie, what should I gaine
By the exaction of the forfeiture?

Now, Antonio had but a few minutes before made an explicit statement that in dealing with Shylock he preferred to "deal at arm's length," so that the evidence to establish fraud must needs be particularly weighty. But when we scrutinize the transaction, it does not appear that the Jew made any false representations whatever. He did, indeed, ask an evasive question, from which it might be inferred that he would not exact the penalty. But this is not the fraud which will vitiate a bond; it is even a grave question as to whether, at the common law, parol evidence of these extrinsic matters would have been received at all. And, moreover, Antonio apparently did not rely upon the representation, such as it was, but assigned his own ability to satisfy the obligation as the inducement to his action.

Come on, in this there can be no dismaie,
My shippes come home a month before the daie.

Again, it must be remembered that Portia decided the bond void by statute, and this made it unnecessary to consider any other grounds of invalidity. Indeed, when an instrument is void by statute, it is the duty of the Court to rest its decision upon that fact; any additional or alternative reason for arriving at the same conclusion is to be considered as merely *dictum*. But, admitting that deception had been practised, and that there was sufficient ground for the admission of parol evidence, it will be noted that no evidence to this effect was brought before the court. When Portia asked the defendant, "Do you confess the bond?" he might, if he had seen fit, have filed a special plea alleging the fraud.¹ But he did not adopt that course. He replied, "I do," and thus admitted the execution of the bond, and gave it a *primâ facie* validity.

These considerations make it clear that Portia's professional reputation has nothing to fear from the first specification of error.

The result of the above admission was, to Portia's logical mind, that Shylock had now a standing in court,

¹ Campbell suggests *non est factum*. But it should seem that the defendant ought, in such a case, to plead specially.—*Collins v. Blantern*, 2 Wils., 347.

for the Jew had in effect filed a good declaration, while the defendant had not yet craved *oyer* of the condition and penalty. It would, therefore, have been premature to pronounce upon the legal effect of that which was not, so to speak, a part of the record. Accordingly, Portia declared that the trial must proceed unless the plaintiff would forbear, and she exerted all her eloquence to effect a settlement and to induce the Jew to enter a *nolle prosequi*. But he refused to be turned from his purpose, and defiantly "craved the law." Portia then proceeded to show how unreasonable this obstinacy was by eliciting from Bassanio a tender of the principal and more; but she vindicated her right to the title of judge by recognizing that "hard cases make bad law," and she refused to compel an acceptance of a tender which had come too late.¹

Portia's next step was to accomplish the result of a demand of *oyer* by asking to be shown the bond. She was thus in a position to address herself to the great question in the case—the validity of the condition and the penalty—a question which had now been put squarely in issue by disposing of every other matter which might have influenced the decision. And it will be observed that this was the first time that the terms of the penalty had come *judicially* to her notice. As an individual, she, in common with every one in Venice, was cognizant of the Jew's demand; but as *judge* she now looked upon the condition and penalty for the first time. Or, if it be objected that the penalty had been matter of record from the first, and that *oyer* was demanded only of the *condition*, it does not follow, as has been pointed out, that Portia would have been justified by the state of the law in at once declaring such a penalty vicious. For, in addition to other considerations, it must be remembered that the law of the Twelve Tables gave to creditors the right to cut the body of their debtor in proportionate pieces if he could not satisfy their claims,² and

¹ The soundness of this position has already been demonstrated. See *supra*, p. 226, Note 2.

² I know that this interpretation of the Twelve Tables is disputed by Dr. Muirhead. But up to his time the consensus of opinion has been to the effect stated in the text.

this was a dangerous precedent. Professor Love, indeed, attempts to distinguish the two cases, by pointing out that at Rome the barbarous act was in the nature of a punishment inflicted, while in Shylock's case the mutilation was the object of the whole transaction. But this distinction is a fine one. It assumes that the limits of lawful consent had been already determined in Portia's time, which is by no means clear. It assumes, moreover, that the Court could at once declare the bond to be nothing but an attempt on the defendant's life. But the defendant had not raised the point; he had admitted the bond, and the Court was compelled to believe that he had gone into the transaction with his eyes open. The only distinction between the two cases would thus be, that in one the penalty was agreed upon by the parties, while in the other it was prescribed by the law. But, at any rate, the question is unimportant as regards the soundness of Portia's position, for it is clear, on principles already adverted to, that her most prudent course was to bring the whole case within the operation of the statute law of Venice. She had, of course, formed her theory of the case, and, in the development of it, had now reached the point at which she must show the applicability of the particular statute on which she ultimately based her decision. But what were the provisions of that statute? All that we know of it is from Portia's own statement, and she, presumably, used the very terms of the act when she said :

. If thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

The offender's life was, we learn subsequently, also forfeited.

It was, in other words, such an enactment as we might expect in view of the state of public opinion toward the Jews. As it was a criminal statute, Portia was compelled to give it a strict construction. Moreover, she was passing upon the suit of an alien whose right to sue was, presumably, dependent on comity only, and, besides, popular

opinion was against the plaintiff. She, therefore, had the honor of the Court to sustain, and, impartial judge that she was, she felt it her duty to proceed with double caution. She accordingly summed up the results of her investigation in the declaration that the bond appeared upon its face to be forfeited, and that, therefore, the Jew might *lawfully* claim the penalty—for it will be noted that the examination of the bond had shown that the penalty was a demand for *flesh*, while the statute spoke only of *blood*. Such a discrepancy may be thought a trifling matter to-day, but the variance would doubtless have been fatal in any one of the *legis actiones* under the Roman formulary system.¹ So she proceeded: (1) to obtain from the plaintiff's own lips an admission that the enforcement of this penalty necessarily involved the shedding of Christian blood; and (2) to demonstrate that fact independently of his admission by a dramatic *reductio ad absurdum*.

She accomplished the former result by an exhortation to mercy (which the Jew, of course, withstood) and by beginning forthwith to pronounce judgment as if in favor of the plaintiff. This made the Jew so bold that he even felt safe in refusing to have some surgeon ready

“To stop his wounds, lest he should bleed to death.”

Having obtained from Shylock this recognition of the fact that the step he proposed to take must result in shedding Christian blood, she at once bridged the last gap which separated her from her conclusion. *She demonstrated that the right to take the penalty of the bond necessarily involved the doing of something forbidden by statute, and hence that the bond conferred no right at all.* This disposes of the second and third assignments of error, for it becomes clear that Portia's declaration that the bond is valid merely related to the effect of that instrument independently of statute. Yet Professor Love and the other

¹ Gaius, c. iv, §§ 16, 21, 30. Thus, where one whose vines had been injured sought redress under the provisions of the Twelve Tables, he lost his case because he used the word “vines,” when the statute spoke generally of trees.—Gaius, c. iv, § 11.

critics so completely misunderstand Portia's argument that they actually accuse her of deciding that the penalty could not be recovered merely because the bond conveyed no right to shed blood !

So far is Portia from being guilty of the quibble of which she is accused that she says to Shylock : " This Court cannot authorize you to shed Christian blood ; our statute law forbids ; but the Court will award you your pound of flesh if you will run the risk of violating the statute in taking it." It is immaterial whether this is regarded as an argumentative statement that the bond is necessarily invalid as being a contract to do something forbidden by statute, or as a statement that the bond is in itself valid, provided the penalty can be recovered without violating the statute. I prefer the former view, and attribute the form of the decision to the dramatic necessities of the case. But the latter view is unobjectionable if Pietscher is right in his opinion, that there was no general principle of law which rendered the bond void. And this disposes of the fourth assignment of error.

More acute than the critics of his judge, Shylock at once sees the relentless logic of the situation and offers to accept the tender of triple payment which lately he refused with scorn. But here again he is met by an obstacle which he cannot overcome. He has refused to show mercy, he has spurned a compromise. He has declared, " I stay here on my bond." Of course, the Court can do only one of two things—it can award him his penalty or award him nothing. This Portia announces with distinctness—first, in the unvarnished statement, " He shall have nothing but the penalty," and then in those powerful lines :

Therefore prepare thee to cut off the flesh,
Shed thou no blood, nor cut thou lesse nor more
But just a pound of flesh ; if thou tak'st more
Or less than just a pound, be it so much
As makes it light or heavy in the substance,
Or the division of the twentieth part
Of one poor scruple, nay, if the scale doe turne
But in the estimation of a hayre,
Thou diest, and all thy goods are confiscate.

In other words, she urges him to avail himself of the only award which the Court can make in his favor, and she terrifies him with a vivid picture of the awful scrutiny to which the Court will subject him in the performance of his impossible task. It is a splendid peroration—a royal *dictum*—a grateful relief after the close logic of her argument.

Shylock pauses. He does not see that Portia's decision means that the Court will permit no attempt to enforce the penalty. He thinks that the Court's decree entitles him to take Antonio's life at the cost of his own, and he deliberates as to whether or not he will pay so high a price. Dr. Furness intimates that the balance is trembling between comedy and tragedy :¹ Shylock's decision not to claim the penalty settles the question in favor of comedy. But suppose that he had decided to claim his fancied right. Even if he had been permitted to attempt the impossible task, his actions could have been so controlled that long before matters had assumed a tragic aspect he would have shed that drop of Christian blood, which, by making him a criminal, would have prevented him from further availing himself of the decree. But, from Portia's argument, as outlined above, it is clear that such a decision on his part would have been met by the indignant explanation that he trifled with the Court who so interpreted its decree. She would have explained that a permission to do the impossible is no permission at all. And this may be asserted with all the more confidence in view of Portia's final refusal to award the Jew the money which Bassanio offered and which Shylock was willing to accept. If Portia had understood that Antonio's life might hang on this portion of her decision, it is too high a tribute even for me to pay to her judicial firmness to suppose that she would not have relaxed the rigid rules of law then and there, and settled the case to the satisfaction of every one.

But it is almost as inhuman to discuss the "what-might-have-been" in a play as to cut a pound of human flesh by way of penalty for non-payment of a debt. And

¹ The Variorum Shakespeare: "The Merchant of Venice," p. 223, note.

so we may take leave of the case with the remark, that there is not wanting in judicial records a precedent for Portia's final act—the passing upon Shylock of a penal sentence for attempting the life of a citizen.¹

On the whole, therefore, we perceive no error in the record, and it follows that Professor Love's assignment of error should be dismissed. The decree of the Venetian Court should be affirmed, and thus tardy justice will be done to the learned Portia. She has been called a "pettifogger;" but even if there are some who will dissent from my view of her opinion, yet all, I think, will admit that she deserves no such appellation. How lacking in gallantry have her stern legal critics been, even assuming their criticisms to be well founded! And it is surely a surprising thing that Professor Love should be found among their number. For was it not Portia who, with matchless eloquence, exhorted the Jew to be merciful? And who should be so ready to show mercy as Love?

AN EXAMINATION OF THE DECISION IN TILDEN *v.* GREEN.

BY R. C. MCMURTRIE, ESQ.

Criticism of a decision of a foreign court is of all things the most dangerous. No one that has watched such attempts upon subjects he is familiar with, can have failed to see that local notions and statutes cannot be readily comprehended by strangers. Two illustrations will suffice. Mr. Bell, Professor of Law in the University of Edinburgh, deduces this result from a study of Kent's Commentaries: "The law of the United States (respecting sales of personal property) . . . is grounded on the law of England, and has indeed been settled nearly on the footing of the

¹ See an instance of a sentence of this kind in connection with a civil suit in a court administering Spanish law, in an article by John T. Doyle, in *The Overland Monthly* for July, 1889. Venetian law was presumably the same.